SUNDHARAN A/L RAMASAMY & ANOR.

v.

LOO SOON MOOK @ LOO KOON LAY & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL SUIT NO. 25-231-1987]
30 JUNE 1994

TORT: Damages - Loss of earnings of plaintiff's mother for nursing plaintiff - Whether plaintiff's mother entitled to her loss of earnings even though she is not a party to the suit - Nursing care - Plaintiff's mother attended to daily needs of plaintiff while in hospital and subsequently at home - Whether parents entitled to compensation for services rendered - Plaintiff not paralysed and is able to walk with funny gait - No evidence adduced whether plaintiff is able to go to toilet by himself and zip-up his trousers and button up his shirt - Whether award for nursing care justified and reasonable.

TORT: Traffic accident - Vehicles travelling in opposite direction - Both parties alleged encroachment against each other - Contradictory version - Burden of proof - On balance of probabilities both parties found equally to blame for accident.

In this case, the 1st plaintiff filed an action at the High Court against the defendants for general and special damages for the injuries and loss suffered by him allegedly arising out of an accident on 25 November 1986 at near 12 milestone, Jalan Batu Kurau, Taiping. At the material time, the two vehicles, that is, the motor cycle ridden by the 1st plaintiff and the motor van driven by the 1st defendant were approaching each other from the opposite direction when the collision occurred.

Held:

[1] On the available evidence and on the balance of probabilities, the frontal collision at the centre white line of the road could not have occurred but for want of care on the part of both the first plaintiff rider and the first defendant driver.

[2] The first plaintiff rider and the first defence driver were equally liable in negligence for the accident.

[3] The first plaintiff's mother was not entitled to the claim for loss of earnings for nursing the first plaintiff for the simple reason that she was not a party to the suit.

[4] The first plaintiff was awarded pre-trial nursing care of RM24,840 for 90 months calculated from 25 November 1986 to 21 May 1994 at RM276 per month. As for the future nursing care, the first plaintiff was awarded RM33,120 based on RM276 per month for 10 years.

[5] As the first plaintiff was 50% to blame for the collision, the damages were reduced accordingly.

[1st plaintiff's claim allowed on 50% liability as both the 1st plaintiff and the 2nd defendant were found equally liable for the accident. Each party to bear its own costs].

[Ed. Note:
Damages (based upon 100% liability):

1.	Fracture of right humerus	-	RM 4,000
2.	Fracture of right femur	-	RM 4,000
3.	Head and residual injuries	-	RM70,000
4.	pre-trial nursing care for 90 months	-	RM24,840
5.	future nursing care for 10 years	-	RM33,120
6.	Agreed special damages	-	RM 1,345**]**

Cases referred to:

Ng Chui Sia v. Maimon bt. Ali [1983] 1 MLJ 110 ***(refd)***
Neo Chan Eng v. Koh Yong Hoe [1960] 26 MLJ 291 ***(refd)***
Mohd Tajuddin Bin Salleh v. Mokhari Bin a/l Murgis & Anor. [1993] 3 CLJ 42 ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] 2 MLJ 175 ***(refd)***
Reliance Omnibus Co. Sdn. Bhd. & Anor. v. Ishak bin Mohd Jaafar & Anor. [1993] 4 CLJ 291 ***(refd)***
Chew Soo Lan v. Ludhiana Transport Syndicate & Anor. [1976] 2 MLJ 205 ***(refd)***
Goh Beng Seng v. Dol bin Dolah [1970] 2 MLJ 94 ***(refd)***
Kasirin bin Kasmani v. The Official Administrator & Anor. [1991] 3 CLJ 2498 ***(refd)***
Multar v. Lim Kim Chet & Anor. [1982] 1 MLJ 184 FC ***(refd)***
Kow Ah Dek & Anor. v. K. Ratnasingam [1981] 2 MLJ 224 FC ***(refd)***
Marappan & Anor. v. Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 SC ***(refd)***
Lim Eng Kay v. Jaafar bin Mohamed Said [1982] 2 MLJ 156 ***(refd)***
Pattana/l Sembadayan v. Periasamy s/o Vellan [1988] 1 CLJ 826 ***(refd)***
Tham Yew Heng & Anor. v. Chong Toh Cheng [1985] 1 MLJ 408 ***(refd)***
Tan Hong Eng v. Chua Peng Lai [1988] 1 MLJ xxxiv ***(refd)***
Yohaini bin Abu Bakar v. Ong Soon Lan [1988] 1 MLJ xxxv ***(refd)***
Pegang Mining Co. Ltd. Choong Sam & Ors. [1969] 2 MLJ 52 PC ***(refd)***
Taylor v. Bristol Omnibus Co. Ltd. & Anor. [1975] 2 All ER 107 ***(refd)***

Other sources referred to:
Halsbury's Laws of England, Vol. 15, 3rd Edn., p. 260

For the plaintiffs - Sam Mathuram; M/s. Mathuram & Co.
For the defendants - Sakthivel Nagalingam; M/s. Thevin Chandran & Wong

JUDGMENT

Haji Abdul Malik Bin Haji Ishak JC:
The first plaintiff rode motorcycle ABF 3529 belonging to the second plaintiff on 25 November 1986 between 1.00 p.m. to 3.00 p.m. and met with an accident at or near the 12 milestone Jalan Batu Karau. It was averred in the statement of claim that the first plaintiff was proceeding in the direction of Taiping when the motorcycle came into collision with the motorvan PBB 1482 belonging to the second defendant and being driven by the first defendant as their servant or agent from the opposite direction resulting in severe and extensive injuries sustained by the first plaintiff.

In the statement of defence, the defendants averred that the said collision was solely caused or substantially contributed to by the negligence of the plaintiffs. And in the particulars of negligence, the defendants averred that the plaintiffs had encroached onto the path and right of way of the defendants rendering it impossible for the defendants to avoid the said collision.

From the tenor of the pleadings, the two vehicles were approaching each other from the opposite direction and at the material time, the collision occurred.

In his evidence, the first plaintiff (at the time of accident he was 18 years of age and now he is 25 years of age) stated that while he was riding the motorcycle (on his way home amidst his SPM examinations) and negotiating a left hand bend towards Taiping, he heard the sound of an engine coming from the opposite direction. He could not see the approaching vehicle as there were oil palm trees blocking his view. He said as he negotiated the left hand bend, he was about 25 centimetres from the centre white line and he did not know how the accident occurred. He said further that he was about 10 centimetres from the left edge of the grass when the accident occurred. Later, he resiled and said that he could not remember the distances between the motorcycle and the centre white line and between the motorcycle and the left edge of the grass. Under cross-examination, the first plaintiff agreed that he rode the motorcycle more to the centre white line. But the first plaintiff disagreed that as he took the left hand bend he had encroached into the first defendant's path. Under re-examination, the first plaintiff was referred to his police report lodged on 3 March 1987 at 4.55 p.m. being part of the agreed bundle where the first plaintiff stated that he heard the engine of a vehicle and he saw a van coming from the opposite direction came nearer to him and he lost consciousness, and was asked to clarify the matter. The first plaintiff admitted lodging a police report to that effect and he sought to explain further that he did not know whether the motorvan collided into him as he had fainted.

In his evidence, the first defendant stated that the motorcycle encroached into his path as he negotiated a right hand bend and that the motorcycle collided into the front right side of the motorvan. He stated that the motorcyclist rode at a fast speed. He denied encroaching into the motorcyclist's path and he further denied that he was speeding as he had to negotiate a bend. Initially, he stated that as he negotiated the bend his view was not obstructed but under cross-examination, he relented and admitted that at the scene there were trees on both sides of the road. He stated that he applied his brakes and took evasive action by turning the motorvan to the left. He further stated that he honked the motorvan but the motorcycle persisted in encroaching into his path and the motorcyclist simply rode the motorcycle looking in the direction of Taiping without looking at his motorvan. He stated that he could not take the extreme left of the road as he negotiated the right hand bend because there was a drain at that portion.

It is quite obvious that both sides gave contradictory versions and each was doing their level best to put the blame on the other.

It is trite law that the first plaintiff must prove affirmatively by evidence that the harm incurred by him was due to the negligence of the first defendant. This principle of law is crystallised from the decision of Hashim Yeop Sani J (as he then was) in *Ng Chui Sia v. Maimon bt. Ali* [1983] 1 MLJ 110 where his Lordship said:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts

> which raised a presumption in favour of the plaintiff. The plaintiff must show affirmatively that there has been a breach of a specific or general duty by the defendant and this resulted in the damage to the plaintiff. If he fails to prove this the action must fail.

In the same vein, some 34 years ago, Neal J. said in the case of *Neo Chan Eng v. Koh Yong Hoe* [1960] 26 MLJ 291 to the effect that:

> The onus of proving negligence on the part of the defendant was on the plaintiff, and the plaintiff failed to discharge the onus either by her own evidence or by cross-examination of the defendant or by admissions made by the defendant.

In **Halsbury's Laws of England,** Vol. 15, 3rd Edn. at p. 260, it is stated that the plaintiff cannot succeed without proof of the defendant's negligence. It was stated there that:

> Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.

On the available evidence, I am satisfied on the balance of probabilities that the frontal collision at the centre of the white line could not have occurred but for want of care on the part or both the first plaintiff rider and the first defendant driver. It is my finding of fact and it is also my judgment that the first plaintiff rider and the first defendant driver are equally to blame for the accident for the following reasons.

Firstly, having seen the demeanour of the first plaintiff rider and the first defendant driver and in view of the conflicting versions, the silent evidence, in particular, the sketch plan and the key, the photographs together with the police reports by both parties (the agreed bundle of documents) and the evidence of retired sergeant 22390 Haji Yusoff bin Amran - all point to equal liability on both parties (See *Mohd Tajuddin Bin Salleh v. Mokhari Bin a/l Murgis & Anor.* [1993] 3 CLJ 42 especially at page 44 on the role of the Court when confronted with contradictory versions). Retired sergeant Haji Yusoff merely drew the sketch plan and the key and he did not witness the accident. Though the first defendant's employer (his taukeh) sat next to him in the motorvan, yet the employer was not called to give evidence (see the first defendant's police report). Thus, there was no independent eye witness to the accident. On perusal of the sketch plan, at 'I' for instance, brake marks of the rear left tyres of the motorvan if projected backwards (see the dissenting judgment of Ong CJ Malay (as he then was) in *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175 and *Reliance Omnibus Co. Sdn. Bhd & Anor. v. Ishak bin Mohd Jaafar & Anor.* [1993] 4 CLJ 291) would touch the centre white line and this would by necessary inference give some clue to the point of impact. That the point of impact must have been at the centre white line is further borne out by the motorcycle which fell right smack in the middle of the centre white line.

Secondly, when the first plaintiff rider and the first defendant driver negotiated the bend (according to the retired sergeant Hj. Yusoff, it was not a sharp corner) they must have cut corners (*Chew Soo Lan v. Ludhiana Transport Syndicate & Anor.* [1976] 2 MLJ 205) and in so doing the accident must have occurred at the centre white line. The first defendant driver in negotiating the right hand bend had 3.10 metres of road on his side (between point 'B' to 'C' in the sketch plan) and about 2.20 metres of road on the grass verge (between "A" to "B" in the sketch plan and in photographs marked 'A' and "B)". The first defendant driver sought to explain that he did not maintain to the extreme left of his side of the road as he negotiated the right hand bend as there was a drain on the grass verge but unfortunately this point was not adverted to by the retired sergeant Hj. Yusoff. Even the key to the sketch plan did not show the presence of any drain on the grass verge and consequently, this must have been an after thought on the part of the first defendant driver. The first plaintiff rider, on the other hand, had 3.10 metres of road on his side while negotiating the left hand bend (from "C" to "D" in the sketch plan) together with a space of 1.45 metres on the grass verge to manoeuvre. From a brief recital of the measurements of the road, the first plaintiff rider and the first defendant driver had ample room to manoeuvre their vehicles while negotiating the bends and they should, bearing, in mind that the area was densely covered with trees, and in the words of the first plaintiff rider that he could hear the engine of the oncoming vehicle but he could not see, travel slowly while negotiating that bend. If each of the parties had been doing this, they would have crossed each other safely and smoothly and there would not have been an

accident. It is clear from the available evidence that the first plaintiff rider and the first defendant driver were not proceeding in a safe manner as expected. It is my finding of fact that both parties travelled on the centre white line while negotiating the bends and both of them had placed themselves in a position of potential danger. Both parties adopted a selfish attitude while riding and driving the vehicles and both parties thought that they have the right to use the road in whatever way they deem fit. They certainly were wrong. Having created the emergency situation, they were not able to extricate themselves out of that predicament (*Goh Beng Seng v. Dol bin Dolah* [1970] 2 MLJ 94 and *Kasirin bin Kasmani v. The Official Administrator and Anor.* [1991] 3 CLJ 2498).

In the circumstances, I find the first plaintiff rider and the first defendant driver equally liable in negligence for the accident.

Quantum

The first plaintiff was admitted to Hospital Daerah Taiping unconscious and according to the medical report of the medical officer dated 16 March 1987, the first plaintiff responded to deep pain and had fractures of the right humerus and the right femur. The first plaintiff was in coma and the medical report stated that:

> Patient made little progress, patient was referred to Neurology Unit K .L. for CAT scanning. CAT scan diffuse brain injury. Patient was sent back to Taiping for nursing.
>
> Subsequently, patient regained conscious (ness).
>
> Develop bed sores - and skin flop repair was done.
>
> **On discharge:** Patient fairly orientated. Has stiffness right arm. Not able to walk without support.

From the Hospital Besar, Kuala Lumpur, a medical report dated 8 October 1987, was prepared by the medical officer from the "Jabatan Bedah Otak dan Saraf" and that report reads thus:

> **Per: Laporan Perubatan kepada Sundharan I/C A 1193595**
>
> The above named was referred from Taiping District Hospital on 29 November 1986 following an alleged motor vehicle accident on 25 November 1986.
>
> On examination he was unconscious and extending to pain. His (Rt) arm was in a U-slab and his right lower limb was on thomas splint.
>
> Skull x-ray done was normal. He had fracture (Rt) humerus and fracture (Rt) femur.
>
> CT scan done for him showed (Rt) temporal contusion with a very tight brain. He had a (Rt) frontal burr hole with ICP monitoring. He also had a tracheostomy done because his lungs was (were) chesty.
>
> Patient was transferred back to Taiping District Hospital with a diagnosis of diffuse head injury.

The first plaintiff gave evidence that after the referral to the Hospital Besar, Kuala Lumpur, he was referred to Yayasan Sultan Idris Shah at Ipoh for rehabilitation but, unfortunately, there was no report from the said Yayasan to back up the first plaintiff's story. Later, the first plaintiff was referred to the Hospital Universiti (to be precise on 25 November 1987) and a report was prepared by Dr. Zaliha Omar, Lecturer in Orthopedic Surgery and Clinical Specialist (Rehabilitation Unit, University Hospital); her report reads thus (the relevant paragraphs):

> He was noted to be conscious. He was very unsteady and not able to walk.
>
> His activities of daily living was totally dependent and has very poor fine movements of his hands.
>
> He also has residual 7th nerve palsy. He was still able to read but unable to write due to severe intestinal tremors.
>
> Prognosis: Guarded, with a rehabilitation programme he should be able to function better.
>
> Further Plan: As patient was from Ipoh, he was referred to Yayasan Sultan Idris Shah for a community-based rehabilitation programme but to come to University Hospital as and when necessary.

These three medical reports were presented before me and they formed part of the agreed bundle of documents, and I need only consider these three medical reports in assessing the quantum of damages (*Multar v. Lim Kim Chet & Anor.* [1982] 1 MLJ 184 FC). It must be mentioned that there was no evidence from the neurosurgeon nor was there any report prepared by the neurosurgeon on behalf of the first plaintiff. The medical reports adverted to

earlier in this judgment were prepared by medical officers and one Dr. Zaliha Omar, a lecturer from the Orthopedic Surgery and Clinical Specialist - all three doctors were not consultant neurosurgeons. Be that as it may, plaintiff had diffused head injury.

I shall now proceed to examine the relevant comparables for head and residual injuries.

In *Kow Ah Dek & Anor. v. K. Ratnasingam* [1981] 2 MLJ 224 FC, a neurosurgeon gave evidence to the effect that the respondent suffered minimal brain damage which resulted in the considerable change in his behaviour. He was in coma III and responded only to pain. He had a marked contusion of his scalp over the right parietal region and showed evidence of a brain oedema (swelling of the brain). The trial Court gave general damages for pain and suffering and loss of amenities at RM70,000 on the basis of full liability and the Federal Court confirmed the award.

In *Marappan and Anor. v. Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 BC, the plaintiff/respondent suffered severe head injuries with contusion of the brain and fracture of the right fronto-parietal bone of the skull which resulted in complete paralysis in all her four limbs. Liability for the accident was agreed to by the parties at 35% against the defendants/appellants and 65% against the plaintiff/respondent. The trial Judge assessed general damages for pain and suffering and loss of amenities at RM180,000 (RM63,000 being 35% of RM180,000).

In *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] 2 MLJ 156, a sum of RM80,000 was awarded for brain injury.

In *Pattan a/l Sembadayan v. Periasamy s/o Vellan* [1988] 1 CLJ 826, the plaintiff was admitted unconscious to the General Hospital, Seremban and was found bleeding from the left ear and mouth and had a fracture of the left perieto-temporal region of the skull. He was in coma for sometime. The neurosurgeon in his report stated that the plaintiff had suffered a severe head injury resulting in parenchymal damage to the left fronto-temporal cortex which resulted in permanent brain damage. A sum of RM75,000 was awarded to the plaintiff.

In *Tham Yew Heng & Anor. v. Chong Toh Cheng* [1985] 1 MLJ 408, the Singapore High Court awarded S$35,000 for permanent brain damage to a 9 year old boy (at the time of the accident) and S$3,500 for the fractured maxilla and laceration of the right cheek. That boy had defects in memory and mental arithmetic.

On the strength of these authorities as comparables and bearing in mind that the first plaintiff could function better with a rehabilitation programme as stipulated by Dr. Zaliha Omar in her report and having seen the first plaintiff while he gave evidence and in view of the fractures of the right humerus and right femur, I would award RM78,000 as general damages for pain end suffering and loss of amenities. I award RM4,000 for fracture of the right humerus after taking into account *Tan Hong Eng v. Chua Peng Lai* [1988] 1 MLJ page xxxiv, where the Singapore Court awarded S$3,500 for this kind of injury. I also award RM4,000 for fracture of the right femur after taking into account *Yohaini bin Abu Bakar v. Ong Soon Lan* [1988] 1 MLJ page xxxv, where the Singapore Court, for fracture of the right femur which had united and a 3 c.m. shortening with a slight lateral bowing which will improve with time as the bone remodelled and the discrepancy of length equalized, awarded S$9,000. For the diffused brain injury sustained by the first plaintiff, a sum of RM70,000 should be reasonable bearing in mind, firstly, that there was no evidence nor report from a neurosurgeon, secondly, the prospects of recovery through rehabilitation cannot be ruled out as the first appellant can now walk by himself though somewhat in a funny gait and, thirdly, there was no evidence that the first plaintiff had a permanent brain injury unlike some of the comparables adverted to earlier in this judgment.

The agreed special damages of the first plaintiff in paragraph 8(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) of the statement of claim came to RM1,345 and I so award accordingly. But, in relation to paragraph 8(e) of the statement of claim of the first plaintiff for loss of earnings of the first plaintiff's mother for nursing the first plaintiff at RM12 per day from the date of accident and still continuing (the period was amended in the course of the trial), I am constrained to hold that the first plaintiff's mother is not entitled to it for the simple reason that she is not a party to the suit. She should have been added as a party to the suit if she thought that she would be directly affected by any order which may be made in the action (*Pegang Mining Co. Ltd v. Choong Sam & Ors.* [1969] 2 MLJ 52 PC). It is now settled

that special damages must not only be pleaded, it must also be proved. Here, the first plaintiff's mother failed to prove the period wherein she was supposed to claim on the balance of probabilities. It was alleged, for instance, that the first plaintiff went to Yayasan Sultan Idris Shah for rehabilitation but there was not a shred of evidence to show that the first plaintiff's mother accompanied him there. Whereas paragraph 8(m) of the statement of claim was abandoned by the plaintiffs and I need not dwell on it.

On nursing care, the first plaintiff gave evidence to the effect that his mother has to take care of him after that fateful accident. But the first plaintiff did not particularise exactly what his mother did for him. The mother, on the other hand, gave evidence that she tended to him while he was hospitalised and, under cross-examination, stated that she had to attend to the daily needs of her son till today without particularising the daily needs that she had to attend to like the case of *Pattan a/l Sembadayan v. Periasamy s/o Vellan (supra).* Be that as it may, it has been held in *Taylor v. Bristol Omnibus Co. Ltd. & Anor* [1975] 2 All ER 107 that compensation for the mother's services was recoverable irrespective of whether or not the mother had to give up outside employment to care for the plaintiff. This case was favourably considered and adopted by our Supreme Court in the case of *Marappan & Anor. v. Siti Rahmah bte Ibrahim (supra)* where Gunn Chit Tuan SCJ (as he then was) held that compensation can be given in money for services rendered by parents. But the facts in *Marappan's case (supra)* are slightly different from the facts in the present suit. There Siti Rahmah was paralysed and needed care and nursing all the time. Whereas the first plaintiff in the present suit is not paralysed and can walk with a funny gait and there is no evidence at all whether the first plaintiff can go to the toilet by himself or can zip-up his trousers and button up his shirts without aid etc, etc. With respect, there was failure on the part of the learned Counsel for the plaintiffs to lead salient evidence on this issue. However, this Court can still assess the quantum on nursing care based on the considerations set out above and would award based on the salary of the first plaintiff's mother as a rubber tapper at RM12 per day and that she would be working for 23 days per month at a figure of RM276 per month (RM12 per day x 23 days = RM276). In the circumstances, for pre-trial nursing care, I would award RM24,840 for 90 months calculated from 25 November 1986 to 21 May 1994. As for the future nursing care, using the multiplier of 10, I would award the first plaintiff RM33,120 based on RM276 per month times 10 years. See *Marappan's* case *(supra)* where a figure of RM350 per month was considered to be fair and adequate for the cost of caring for Siti Rahmah at home.

To summarize, on the basis of full liability, the first plaintiff would have been entitled to:

(1)	fracture of the right humerus	= RM 4,000.00
(2)	fracture of the right femur	= RM 4,000.00
(3)	head and residual injuries	= RM70,000.00
(4)	pre-trial nursing care for 90 months	= RM24,840.00
(5)	future nursing care for 10 years	= RM33,120.00
(6)	agreed special damages	= RM 1,345.00
		= RM137,305.00

However, having regard to my finding that the first plaintiff was 50% to blame for the collision, the damages aforesaid will have to be correspondingly reduced and I make an award accordingly. I would also award interest at the rate of 6% for general damages from date of service of writ to judgment and 8% until date of realisation. The agreed special damages to attract interest at the rate of 4% from date of accident. I also order each party to bear its own costs.